No. 07-937

In the Supreme Court of the United States

CITY NATIONAL BANK OF WEST VIRGINIA,
PETITIONER

v.

DEPARTMENT OF AGRICULTURE,
FARM SERVICE AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly declined to abrogate this Court's doctrine of derivative jurisdiction as applied to the removal of cases from state court under 28 U.S.C. 1442, where Congress has abrogated the doctrine in another context, but specifically not eliminated it with respect to removals under Section 1442.

2. Whether application of the doctrine of derivative jurisdiction to this case violated the equal protection or due process guarantees of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 498 F.3d 236. The judgment of the district court (Pet. App. 29-33) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2007. A petition for rehearing was denied on October 15, 2007 (Pet. App. 34-35). The petition for a writ of certiorari was filed on January 14, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In *Lambert Run Coal Co.* v. *Baltimore & Ohio Railroad*, 258 U.S. 377 (1922), this Court explained that

"[t]he jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." *Id.* at 382; see *Arizona* v. *Manypenny*, 451 U.S. 232, 242 n.17 (1981) (citing cases).

In 1986, Congress limited the scope of the derivative jurisdiction doctrine by amending the general removal provision, 28 U.S.C. 1441, by adding Section 1441(e), which provides: "The court to which *such civil action* is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim." Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3, 100 Stat. 637 (emphasis added). In 2002, Congress again amended Section 1441. It created a new Section 1441(e), redesignated the prior Section 1441(e) as Section 1441(f), and amended the language of Section 1441(f). See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11020(b)(3)(A), 116 Stat. 1827. As amended, Section 1441(f) provides: "The court to which a civil action is removed *under this section* is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim." 28 U.S.C. 1441(f) (Supp. V 2005) (emphasis added).

The separate statutory section that governs removal from state court by the United States or federal officers or agencies, 28 U.S.C. 1442, has never been amended with respect to the doctrine of derivative jurisdiction.

2. John and Stacey Palmer filed this suit in the Circuit Court of Kanawha County, West Virginia, against petitioner City National Bank of West Virginia, as well as Bank One, N.A., and Stuart Kaufmann, alleging, *inter alia*, breach of contract and that the Palmers were induced to enter into certain loan agreements on the basis of fraudulent misrepresentations. C.A. App. 15-19; Pet. App. 3. Petitioner sought leave, which the state court granted, to file third-party claims against the United States Department of Agriculture (USDA) and the Farm Service Agency (FSA), alleging breach of contract, implied indemnification, and contribution. *Id.* at 3-4. Petitioner contends that the Palmers secured their loans "relying upon written representations by FSA that it would guarantee the loans." Pet. 3.

The federal defendants removed the case to the United States District Court for the Southern District of West Virginia pursuant to 28 U.S.C. 1442(a)(1) and moved to dismiss the third-party claims under Fed. R. Civ. P. 12(b)(1). Pet. App. 4. The United States argued that the United States' sovereign immunity deprived the Circuit Court of Kanawha County of jurisdiction to consider the third-party claims because the United States had not waived its sovereign immunity to contract or tort suits in state court, and that the district court acquired no jurisdiction to hear those claims upon removal under Section 1442. *Ibid.* The district court granted the United States' motion and dismissed petitioner's third-party claims on the basis of the derivative jurisdiction doctrine. *Id.* at 29-33. The court then remanded the remaining claims to state court. *Id.* at 32.

3. On appeal, petitioner argued that the derivative jurisdiction doctrine did not apply; that, if it did, the court should create an exception to the doctrine where

state law compels impleader, and that the doctrine would violate due process and equal protection if applied to petitioner's claims. Pet. App. 19-20.

The court of appeals first addressed its appellate jurisdiction to review the district court's order, in light of the fact that the order had remanded the underlying claims to state court, and 28 U.S.C. 1447(d) provides that remand orders are not reviewable on appeal. Pet. App. 5-15. The court concluded that it possessed appellate jurisdiction under this Court's decision in *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), which upheld review of a district court order dismissing a cross-claim in circumstances where the appellate court's decision would not affect the district court's remand order. *Id.* at 143-144. The court of appeals concluded that, under *Waco*, it had authority to review the district court's final order conclusively dismissing the claims against the federal defendants because review of that legally distinct issue, which would otherwise be unreviewable, would not undermine the remand aspect of the district court's order: "the state-court proceedings between the Palmers (as plaintiffs) and City National (as defendant)" would "proceed in state court regardless of whether the federal defendants were correctly dismissed." Pet. App. 14.

Turning to the merits, the court of appeals affirmed the district court's dismissal of petitioner's third-party claims on the basis of the derivative jurisdiction doctrine. Pet. App. 15-26. First, the court observed that Congress had, by the plain terms of Section 1441(f), abrogated the doctrine only with respect to actions removed under that section, and not those removed under Section 1442. "[B]ecause the plain language of § 1441(f) limits the abrogation of derivative jurisdiction to remov-

als under § 1441 and because [circuit] precedent h[eld] that the doctrine is viable for removals under § 1442," the court concluded that the doctrine applied to the instant dispute. *Id.* at 19. The court also declined to create an exception to the doctrine based upon the joinder requirements allegedly imposed by state law. The court observed that it would be inappropriate to make "a district court's jurisdiction over the case" turn upon state law rules of compulsory joinder. *Id.* at 19-20.

The court then addressed and rejected petitioner's constitutional arguments. The court stressed that petitioner "remains free to bring a separate action against the federal defendants in an appropriate forum, *i.e.*, the Court of Federal Claims, for its contract action, in accordance with the Tucker Act, [28 U.S.C. 1491(a),] and a district court, for its indemnity claims, in accordance with the [Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*]." Pet. App. 21. Even assuming, *arguendo*, that West Virginia law would provide a substantive defense to a contribution claim brought separately from the underlying action, the court stated that application of the derivative jurisdiction doctrine did not warrant heightened scrutiny because "operation of a substantive rule of law to bar a suit does not violate the right of access to a judicial forum." *Id.* at 22. Applying rational basis review, the court rejected petitioner's equal protection claim because "[t]he distinctions between general removal and federal-officer removal provide plausible reasons for the congressional action at issue in this case." *Id.* at 24. Finally, the court of appeals held that petitioner was not deprived of any property interest in violation of due process because "application of the derivative-jurisdiction doctrine in this case does not bar [petitioner] from instituting a separate pro-

ceeding against the federal defendants in an appropriate forum." *Id.* at 25.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. This Court long ago established the rule, which it has reaffirmed on numerous occasions, that "[t]he jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction," and that "[i]f the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R.*, 258 U.S. 377, 382 (1922); see *Arizona* v. *Manypenny*, 451 U.S. 232, 242 n.17 (1981) (citing cases).

As noted above, Congress recognized the derivative jurisdiction doctrine, and overruled it in part, in 1986 and again addressed the doctrine in 2002. Significantly, however, Congress limited its legislative alteration of the doctrine to removals under Section 1441, and did not disturb the rule with respect to removals by the United States, its agencies, or officials under Section 1442. Where Congress legislates against the backdrop of clear precedent from this Court, modifying one aspect of the judicial rule but not others, principles of stare decisis strongly counsel against the Court's overruling the part of the rule that Congress has implicitly endorsed by leaving it untouched. See, *e.g.*, *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 384-386 (1983). That principle is particularly apposite here, where Congress revisited the statute a second time in a manner that clarifies

that Congress did *not* abrogate the judicial doctrine in its entirety.

In 1986, Congress limited the scope of the derivative jurisdiction doctrine as it applied to removals under the general removal provision, 28 U.S.C. 1441. That section authorizes removal, in certain circumstances, of actions brought in state court "of which the district courts of the United States have original jurisdiction," 28 U.S.C. 1441(a), of claims joined with those otherwise within the federal courts' original jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1441(c), and of suits against foreign states, 28 U.S.C. 1441(d), which are also within the federal courts' original jurisdiction unless the foreign state is immune, 28 U.S.C. 1330(a).[1] Congress limited the doctrine of derivative jurisdiction with respect to such removals by adding a new subsection (e) at the end of Section 1441, which provided that "[t]he court to which *such civil action* is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim." Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3, 100 Stat. 637 (emphasis added). Through that amendment, Congress permitted suits that could have been brought in federal court as an original matter to proceed in federal court when brought there via removal under Section 1441(d), even if the state court did not possess jurisdiction.

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[1] In 2002, Congress further authorized removal of a state court action that arises from the same event that gave rise to a claim within the district court's jurisdiction under 28 U.S.C. 1369 (Supp. V 2005), concerning discrete events resulting in more than 75 deaths, even if the removed action "could not have been brought in a district court as an original matter." See 28 U.S.C. 1441(e)(1)(B) (Supp. V 2005).

Congress's 1986 legislation did not make any amendment to Section 1442 with respect to the derivative jurisdiction doctrine. At that time, Section 1442 authorized removal from state to federal court by any officer of the United States or its agencies, or those acting under any such officer, as well as by officers of the federal courts or Houses of Congress and property holders whose title derived from a federal officer. 28 U.S.C. 1442 (1982). Unlike Section 1441, Section 1442 authorized removal on the basis of a federal defense, such as immunity, regardless of whether the suit could have been brought originally in federal court. See *Mesa* v. *California*, 489 U.S. 121, 136 (1989) (Section 1442(a) "serves to overcome the 'well- pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged"). Later, Congress amended Section 1442 to permit removal by the United States or federal agencies on the basis of the defendant's federal status. See Federal Courts Improvement Act of 1996, Pub. L. 104-317, § 206(a), 110 Stat. 3850.

Despite the fact that Congress had specifically amended Section 1441 while leaving Section 1442 untouched with regard to the derivative jurisdiction doctrine, the Eighth Circuit construed the 1986 amendment has having eliminated the doctrine in its entirety. *North Dakota* v. *Fredericks*, 940 F.2d 333 (8th Cir. 1991); Pet. App. 20 (discussing *Fredericks*). In 2002, Congress again amended Section 1441 and clarified that the derivative jurisdiction doctrine is abrogated only with respect to Section 1441 removals. See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11020(b)(3)(A), 116 Stat. 1827. The 2002 amendment redesignated the prior subsection (e) as subsection (f), and amended the language of the new sub-

section (f) to make clear that it applies only when "a civil action is removed *under this section*." 28 U.S.C. 1441(f) (Supp. V 2005) (emphasis added).

The court of appeals in this case correctly held that "the plain language of § 1441(f) limits the abrogation of derivative jurisdiction to removals under § 1441." Pet. App. 19. See *Barnaby* v. *Quintos*, 410 F. Supp. 2d 142, 144 (S.D.N.Y. 2005) ("In amending the statute in 2002, and replacing less precise language with much more specific language, Congress left no doubt that Section 1441(f) applies only to removals under Section 1441 and not to removals under any other section of the United States Code."); 14B Charles Alan Wright et al., *Federal Practice & Procedure* § 3721, at 191 (3d ed. Supp. 2007) ("New § 1441(f) limits the abrogation of the derivative jurisdiction doctrine to cases removed under [Section] 1441."). Where Congress has demonstrated its recognition of a well-established judicial construction of a statute and legislatively overturned that rule in only some respects, it can be presumed to have impliedly endorsed the rule to the extent it is not amended. See *Herman & MacLean*, 459 U.S. at 384-386.[2]

The Court should be especially wary of overruling established precedent where the backdrop rule against

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[2] In light of the 2002 amendment, the court of appeals' decision does not, contrary to petitioner's contention (Pet. 6), conflict with the Eighth Circuit's decision in *Fredericks*. As the court of appeals in this case explained, "[w]hether the Eighth Circuit correctly interpreted the 1986 amendment is academic, because in 2002," after *Fredericks* was decided, "Congress again amended § 1441." Pet. App. 17. Because "§ 1441(f) is more clear than former § 1441(e) in abrogating derivative jurisdiction only with respect to removals effectuated under § 1441," Pet. App. 19, the Eighth Circuit's construction of the old Section 1441(e) is irrelevant and does not present a conflict that this Court need resolve.

which Congress has acted concerns the jurisdiction of the federal courts over claims against the United States. See, *e.g.*, *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750, 756-757 (2008) (declining to overturn century-old precedent regarding jurisdictional nature of statute of limitations for claims before the Court of Federal Claims in light of Congress's implicit acquiescence by amending the statute without overruling that precedent). That concern is apposite here, where Congress has retained the derivative jurisdiction doctrine as it relates to removals by the United States. As the court of appeals explained, Congress had good reason to distinguish between the two statutes for purposes of the derivative jurisdiction doctrine. "[B]ecause any case removed under § 1441 could have originally been brought in federal court, Congress may have thought it irrelevant whether the state court had jurisdiction over the action prior to removal." Pet. App. 24. "On the other hand, a case removed under § 1442 may not have had original federal jurisdiction, and thus Congress decided to retain the traditional rule that removal jurisdiction is derivative of state court jurisdiction prior to removal." *Ibid.* If petitioner's position were adopted, plaintiffs could maneuver a claim against the United States into federal district court via removal in situations where neither the state nor federal district courts would have had original jurisdiction. Indeed, that is the case here: this action, which began as a state-law claim between non-diverse defendants, could not have been brought in federal court as an initial matter.

2. The court of appeals' holding that application of the derivative jurisdiction doctrine to petitioner's case was not unconstitutional is also correct and does not conflict with any decision of this Court or any court of

appeals. As the court of appeals correctly concluded, and as the discussion above demonstrates, the differences between removal under Section 1441 and Section 1442 amply justify their distinctive treatment for purposes of the derivative jurisdiction doctrine. Petitioner's equal protection claim must therefore fail. See Pet. App. 24.

Nor does application of the derivative jurisdiction doctrine deprive petitioner of a property interest without due process of law. As an initial matter, it is not clear that petitioner would, as it maintains (Pet. 9-12), be barred as a matter of substantive state law from pursuing a claim for contribution or indemnification from the United States in a separate proceeding in a federal court of competent jurisdiction. Although petitioner "takes exception to the Fourth Circuit's description of the state law * * * as 'procedural'" (Pet. 16), the very decision of the West Virginia Supreme Court of Appeals upon which petitioner relies (Pet. 9) describes the joinder rule as one of the "procedural aspects" of a contribution claim, *Howell* v. *Luckey*, 518 S.E.2d 873, 876 (W. Va. 1999). Moreover, by its terms, *Howell* appears only to require that the defendant "file a third-party claim pursuant to Rule 14(a) of the West Virginia Rules of Civil Procedure," *id.* at 877, which petitioner did. None of the state decisions cited by petitioner specifies the consequences for a contribution claim if the defendant files a third-party claim, but the third-party defendant is found to be immune from the state court's jurisdiction. Whether West Virginia law has the effect petitioner claims cannot be determined until petitioner brings its claim against the United States in a court with jurisdiction to adjudicate the dispute on the merits. As the court of appeals observed, petitioner cannot claim

that it has been deprived of any right to judicial process when it "has not yet availed itself of the appropriate federal fora for resolving its claims against the federal defendants." Pet. App. 21-22.

Even assuming that petitioner's contribution and indemnification claims would fail as a matter of substantive state law if they cannot be litigated in the same action as the underlying dispute between the Palmers and petitioner, that would not make it a violation of due process for the federal courts to adhere to the limits on their jurisdiction that make it practically impossible for the claims to be litigated together. Indeed, it is an essential characteristic of the doctrine of sovereign immunity (the basis of the state court's and ultimately the federal court's lack of jurisdiction) that some claims against the sovereign will never be vindicated for want of a forum in which they can be asserted. For example, in *United States* v. *Neustadt*, 366 U.S. 696 (1961), the Court upheld the United States' assertion of sovereign immunity under 28 U.S.C. 2680(h) against a state law tort claim for misrepresentation, the very type petitioner asserts here, without any suggestion that the denial of a forum to litigate such claims against the United States violates due process. West Virginia's rule of compulsory joinder no more forms a basis for this Court to expand the district courts' removal jurisdiction under Section 1442(a) than the state law would warrant expanding the Court of Federal Claims' limited jurisdiction under 28 U.S.C. 1491(a) to cover the Palmer's underlying suit if it is ultimately determined that petitioner's claims against the United States sound in contract and therefore belong before that tribunal under the Tucker Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2008